NO. 74-618

FILED
NOV 19 1974
MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

October Term, 1974

JOSEPH DYRE MORSE,

Petitioner,

v.

ALEX WILSON, Warden
COLORADO STATE PENITENTIARY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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JOSEPH DYRE MORSE, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case, on July 29, 1974, Petition for Rehearing denied August 22, 1974, affirming the Judgment of the United States District Court for the District of Colorado, whereby Petitioner, an inmate of the Colorado State Penitentiary, was denied a Writ of Habeas Corpus filed pursuant to 28 U.S.C. Sec. 2254.

The principal grounds for federal Habeas Corpus relief being:

I.

A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE OF APPROVAL BY THE COLORADO SUPREME COURT OF THE USE OF DEPOSITIONS AT PETITIONER'S STATE TRIAL CONTRARY TO A SPECIFIC COLORADO STATE CONSTITUTIONAL MANDATE PROHIBITING THE USE OF SAID DEPOSITIONS.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, entered July 29, 1974, selected for official publication, has been officially reported in 500 F.2d 1264 and is set forth in the Appendix, infra.

The Memorandum Opinion and Order Denying Petitioner's Application For A Writ of Habeas Corpus entered on June 1, 1973 by the United States District Court for the District of Colorado is set forth in the Appendix, infra.

DATE OF JUDGMENT AND TIME OF ENTRY

The Judgment of the Court of Appeals for the Tenth Circuit was entered on July 19, 1974 and a Petition For Rehearing was denied on August 22, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

I.

DOES THE USE OF DEPOSITIONS IN A STATE CRIMINAL TRIAL IN VIOLATION OF A SPECIFIC STATE CONSTITUTIONAL MANDATE PROHIBITING THE USE OF SUCH DEPOSITIONS DENY A DEFENDANT DUE PROCESS OF LAW AND/OR EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

II.

TO SUSTAIN A CLAIM OF VIOLATION OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IS A DEFENDANT TRIED IN A STATE COURT FOR A FELONY HELD TO THE EXTREMELY HIGH DEGREE OF PROOF OF SHOWING HIS LEGAL REPRESENTATION WAS A MERE "SHAM, MOCKERY, OR FARCE"?

CONSTITUTIONAL PROVISIONS INVOLVED

A. United States Constitution:

AMENDMENT 14

As pertinent here, provides:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the Laws."

AMENDMENT 6

As pertinent here, provides:

"In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

B. Constitution of the State of Colorado:

ARTICLE II SECTION 16

Section 16. "Criminal Prosecution – rights of defendant – In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

ARTICLE II SECTION 17

Section 17. "Imprisonment of witnesses-depositions-form. – No person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. *If he can give security he shall be discharged;* if he *cannot* give security *his deposition shall be taken* by some judge of the supreme, district or county court, at the earliest time he can attend, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice. The accused shall have

the right to appear in person and by counsel. If he has no counsel, the judge shall assign him one in his behalf only. *On the completion of such examination the witness shall be discharged on his own recognizance, entered into before said judge, but such deposition shall not be used if in the opinion of the court the personal attendance of the witness might be procured by the prosecution, or is procured by the accused.* No exception shall be taken to such deposition as to matters of form." (emphasis supplied)

CONCISE STATEMENT OF THE CASE

The basis for federal jurisdiction is 28 U.S.C. Sec. 2254 following exhaustion of state remedies.[1]

Petitioner, herein referred to as "Morse" was charged with the murder of one Elaura Jeanne Jaquette on July 9, 1966; Morse was arrested August 5, 1966 and while in custody and after refusing him permission to call his wife or a friend and following numerous police interrogations and after he had signed a consent to search his home, he was formally charged by information with first degree murder on August 8, 1966, on which date defense counsel was court appointed.

Subpoenas were issued by the prosecution for JoAnna Morse, age 12, and Emily Morse, age 17, the daughter and step-daughter of Petitioner, Morse, service of said subpoenas being made in accordance with state law, on November 18, 1966, commanding them to appear where Morse was scheduled for trial, on November 30, 1966 at 2:30 p.m. *These subpoenas were never quashed.* However, on November 25, 1966 at 5:20 p.m., in a closed courtroom, dominated by the

[1] The Court of Appeals for the Tenth Circuit specifically found there was no problem regarding failure to exhaust state remedies nor intentional by-pass thereof. See page A-4 of the Appendix, infra.

judge and prosecuting attorney, the only other persons being present being the court reporter, Morse and his two attorneys and while *neither* their mother nor any outsiders were present and Morse was known to be under arrest for first degree murder, the depositions of JoAnna and Emily Morse were taken. These deponents at all times material resided within twenty miles of the Boulder County Colorado Courthouse where Morse was tried.[2]

Trial commenced November 28, 1966 and the prosecution rested at 9:01 a.m., December 3, 1966. During the prosecution's case after twelve witnesses had appeared personally on behalf of the prosecution, the depositions of JoAnna and Emily Morse were read to the jury. Neither JoAnna nor Emily Morse personally appeared in accordance with the outstanding subpoenas; no foundation or predicate for the admission of said depositions was laid for the use of said depositions in accordance with Article II, Section 17 of the Colorado State Constitution.

No effort was made by the prosecution to procure the personal attendance of either deponent, who were under subpoena and resided within twenty miles or so of the courthouse; the trial judge made no inquiry as to the whereabouts of said witnesses, but permitted the use of said depositions on the basis of a purported stipulation between the prosecuting and defense attorneys, despite the constitutional mandate of said Article II, Section 17 that ". . . If in the opinion of the court the personal attendance of the witness might be procured by the prosecution . . .", such depositions ". . . *shall* not be used . . .". Neither the prosecuting nor defense attorneys requested nor did the trial judge give the jury a definition as to what a "deposition" was, but on the contrary identified the woman who read the answers of the deponents in said depositions as ". . . .Mrs. Johnson, from the Adult Probation Department of this

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[2]Judge Finesilver, the Colorado Federal District Judge specifically made this finding in his Memorandum, Opinion and Order. See page A-9 of the Appendix, infra.

Court . . ." without any further explanation to the jury and absent any request for an explanation or objection by defense counsel.[3]

The murder scene was an organ practice room for university music students which was literally covered with blood. The prosecution possessed clothes allegedly worn by Morse at the time of the murder. The prosecution's FBI blood expert could identify *no* blood on said clothes and despite numerous lurid pictures depicting blood all over the room and despite testimony by prosecution witnesses depicting the gory murder scene, defense counsel did not cross-examine regarding the absence of blood on Morse's clothes. Morse was a university maintenance and custodial employee who had ready access to the murder room and had been there shortly prior to the murder in the course of his duties. Despite the semi-public nature of said organ practice room, its use by and ready availability to all music students majoring in organ, the *only* prosecution evidence of any fingerprints was a latent portion of a palm print allegedly belonging to Morse found on a piece of plywood, the alleged murder weapon, from a crate in said room and there was no evidence of any fingerprints on the opposite side of said board, the alleged murder weapon, which by the prosecution's own theory of necessity had to be gripped tightly. There was no defense cross-examination regarding this matter. A prosecution detective witness testified he had attempted to find fingerprints in other portions of the room, but when defense counsel made a slight effort to cross-examine regarding this matter, an objection was

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[3]Although Morse maintains Article II Section 17 of the Colorado Constitution is a "mandate" not subject to "stipulation" rather than a "right", subject to waiver, the Colorado attorney general, who represents Respondent herein has candidly admitted the record is "silent" as to the circumstances under which said depositions were taken and the record is also silent as to any knowledge by Morse as to the existence of said constitutional "mandate" prohibiting use of said depositions under the circumstances.

sustained and the matter not further pursued by defense counsel nor preserved as error in the Motion for New Trial.[4]

Trial defense counsel waived their opening statement; the defense case in Morse's first degree murder trial took a mere thirty-one minutes and only three defense witnesses testified; *no instructions whatsoever* for the defense were tendered to the court and but a single objection was made to the court's instructions. No pre-trial motion for change of venue was made despite a considerable amount of publicity and it being common knowledge as to the attitude of citizens of Boulder County regarding cases involving the murder of a university coed.[5]

The jury returned a verdict of guilty at 5:20 p.m., *Saturday*, December 3, 1966 of first degree murder and the court allowed thirty days for filing of a Motion for New Trial, which, was, in fact, filed approximately forty-two hours after the guilty verdict on *Monday*, December 5, 1966 and which consisted of but two grounds and not even the ground of insufficiency of the evidence, said motion being heard approximately twenty-two hours thereafter on December 6, 1966 and was denied during a hearing *which took a mere ten minutes*, during which time the court commended all counsel; sentenced Morse to be confined for life in the Colorado State Penitentiary and Morse was delivered to the Warden of said penitentiary on *Wednesday*, December 7, 1966, where he has been incarcerated ever since. Morse's State Motion for Post-Conviction Relief raised sixteen grounds supporting his claim of ineffective assistance of counsel, which were perfunctorily rejected by the Colorado Supreme Court and although raised in his Petition For Writ of Habeas Corpus were not factually considered in Judge Finesilver's Memorandum Opinion and

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[4] Present counsel did not represent Morse until after denial of the Motion for New Trial. Under Colorado law failure to preserve trial errors in a Motion for New Trial constitutes a waiver of trial errors, preventing review, except in the very limited situations of "plain error".

[5] See *Walker* v. *People*, 126 Colo. 135, 248 P.2d 297 (1952). Cf *Walker* v. *People*, 458 P.2d 238 (Colo., 1969).

Order and although noted in the Opinion of the Tenth Circuit, infra in the Appendix, were disposed of by said Court by the perfunctory statement "There is no merit in any of the Petitioner's contentions."

REASONS FOR GRANTING THE WRIT

I.

THE USE OF THE DEPOSITIONS OF JOANNA AND EMILY MORSE AT MORSE'S TRIAL WAS CONSTITUTIONALLY PROHIBITED BY ARTICLE II, SECTION 17 OF THE COLORADO CONSTITUTION AND THE CONCLUSION OF THE COURT BELOW TO THE CONTRARY VIOLATED THE BASIC CONCEPTS OF DUE PROCESS AND EQUAL PROTECTION OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

It is a basic concept that "The Constitution, as the dispenser of the sovereign power of a State, is the ultimate source of the judicial power of the Courts" (21 C.J.S., Courts, Sec. 120)and further that "A Court cannot transcend the powers granted to it by law" (21 C.J.S., Courts, Sec. 86). Article II, Section 1 of the Colorado Constitution specifically provides:

> "All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, *and is instituted solely for the good of the whole."* (emphasis supplied)

In *People v. Prevost*, 55 Colo. 199, 134 P. 129, 133 (1913), the Colorado Supreme Court recognized this constitutional limitation upon judicial power, stating ". . . This Court must not usurp power, or abuse its right of construction . . . the power of the Courts should be exerted only within the limits of the Constitution and be not abused . . ."

The framers of the Colorado State Constitution were not satisfied with merely conferring upon an accused certain "rights" as expressed in Article II, Sec. 16 of the Colorado

Constitution, including the *right* "... to meet the witnesses against him face to face . . .", but in the very next section, Article II, Sec. 17, provided as to *depositions* taken in a criminal case that any "... such deposition *shall not* be used if in the opinion of the Court the personal attendance of the witness might be procured by the prosecution. . . ." (emphasis supplied). The Colorado Supreme Court has consistently construed the word "shall" as being "mandatory" (*Swift v. Smith,* 119 Colo. 126, 201 P.2d 609 (1949); *Board of County Commissioners v. Edwards,* 171 Colo. 449, 468 P.2d 857 (1970)). The established general rule is that constitutional provisions are construed as mandatory "... and disobedience or evasion is not permissible, even though the best interest of the public might apparently be promoted in some respects." (16 C.J.S., Constitutional Law, Sec. 61). Recognizing that "Courts are instruments of governments, and exercise only such powers as are invested in them . . ." (*Bulger v. People,* 61 Colo. 187, 156 P. 800, 804 (1916)), the court in *Thompson v. Davis,* 117 Colo. 82, 184 P.2d 133 (1947) held "... It does not lie within the power of the attorneys, nor within the province of the Court, to disregard any of the Rules of Civil Procedure. . ." and, that an attempt to do so by "stipulation" was *ineffectual.* Yet, as to the constitutional "mandate" against the use of depositions at Morse's trial under the circumstances, where the witnesses were available, the Colorado Supreme Court found little merit in such contention (*Morse v. People,* 501 P.2d 1328, 1330 (Colo., 1972)) and Judge Finesilver found said constitutional "mandate" to be "... procedural in nature rather than substantive. . .", subject to waiver and stipulation by counsel (see Appendix, p. A-13 infra).

The court below as to said Article II, Sec. 17 concluded:

1. It was argued that the "right" granted by the Colorado constitutional provision is absolute and not subject to waiver.[6] The court held there could be and was a waiver. (see Appendix, p. A-4, infra)

[6] Morse has never argued that the *prohibition* against the use of depositions where witnesses might be procured by the prosecution was a "right", but on the contrary, maintained that this *prohibition* was a constitutional "mandate" not subject to waiver or stipulation.

2. The clause (prohibiting use of deposition where the personal attendance of a witness might be procured by the prosecution) of Article II, Sec. 17 dealing with the use of a deposition is an *incidental* provision. (see Appendix, p. A-4, infra).[7]

3. "The main thrust of the section is prevention of imprisonment of a witness who cannot give bond or security for his or her appearance and thus the clause limits use of the testimony of an *itinerant* witness. . . ." (emphasis supplied; See Appendix, p. A-4, infra).

Thus, the Court construed said section as a limitation upon the ". . . use of the testimony of an *itinerant* witness. . ." (Emphasis supplied). Under this construction, it would appear that "itinerant" witnesses are to be treated differently than "non-itinerant" witnesses. The Court does not make clear as to whether or not under said Article II, Section 17, the "deposition" can be taken of either an "itinerant" or "non-itinerant" witness who can give security, and the language of said Article II, Section 17, as to the procedure for taking of depositions applies *only* where a witness ". . . cannot give security. . .", said second sentence of Article II, Section 17, reading:

> "If he can give security he shall be discharged: *if he cannot give security his deposition shall be taken* by some judge of the Supreme, District or County Court, at the earliest time he can attend, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice . . ." (Emphasis supplied).

Said Article II, Section 17, then provides as to one unable to give "security", whose "deposition" has been taken, that:

> ". . . On the completion of such examination the witness shall be discharged on his own recognizance . . ."

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[7]The characterization of said constitutional "mandate" as being an "incidental" provision is contrary to the most basic rules of constitutional construction as heretofore noted.

Thus, contrary to the Tenth Circuit's construction that said constitutional provision ". . . limits use of the testimony of an *itinerant* witness. . ." (Emphasis supplied), said constitutional provision makes a "classification" as between prospective witnesses who *can* give "security" and prospective witnesses who *cannot* give "security". It would be immaterial as to whether any such witness was "itinerant" or not. Under said constitutional provision, the real test is *not* "itinerancy" but "indigency". A witness capable of giving "security" whether itinerant or non-itinerant could avoid giving his deposition, since said constitutional language specifically provides ". . . If he can give security he shall be discharged. . ." and preservation of his testimony by deposition would be lost to both the prosecution and defense.

An "itinerant" is one who journeys from place to place (*The Compact Edition of the Oxford English Dictionary*), equally applying to the wealthy as well as the indigent.

If, as the Tenth Circuit says, the purpose of the clause was to limit the use of testimony of an "itinerant" witness, then the deposition testimony of JoAnna and Emily Morse should not have been read, since they were not "itinerants", residing a mere twenty or so miles from the place of trial and being under subpoena.

Although the Tenth Circuit Court of Appeals said ". . . The main thrust of the section is prevention of imprisonment of a witness who cannot give bond or security for his or her appearance. . .", IF the Court had *intended* to say, ". . . Thus the clause limits use of the testimony of an *indigent* [rather than "itinerant"] witness. . ." (Emphasis supplied), then said constitutional provision is discriminatory because said constitutional provision fails to provide any procedure for the taking of the "deposition" of one who "can" give security.

Any classification whether based upon "itinerancy" or "indigency" falls squarely within the prohibitory ambit of the Fourteenth Amendment to the Constitution of the United States which prohibits states from denying ". . . To any person within its jurisdiction the equal protection of the

laws". Either such "classification" of witnesses could serve no possible governmental interest and for "classifications" to withstand judicial scrutiny, there must be some logical basis for the "classification". Certainly, "wealth" or "lack of wealth" or "itinerancy" or "non-itinerancy" furnishes no such logical basis any more than a "classification" based upon "sex". See: *Reed v. Reed*, 404 U.S. 71; 30 L.Ed 2d 225, 92 S.Ct. 251 (1971).

The Court of Appeals below attempted to justify use of said depositions on the grounds that the deponents were 12 and 17 years of age, respectively, but the constitutional mandate of Article II, Section 17 prohibiting the use of depositions where the witnesses were available makes no exceptions for minors.

Also, the Court of Appeals below attempted to justify its finding contrary to the mandatory prohibition against use of depositions where witnesses were available on the ground "... This very clause allows the defendant to secure the presence of the witness if he wishes...." (A-5, infra). However, the deponents were prosecution witnesses and Petitioner had no duty or obligation to produce them whereas under said constitutional mandate, it was provided that no "... such deposition shall not be used if in the opinion of the court the personal attendance of the witness *might be procured by the prosecution...*" (Emphasis supplied), and in this case, deponents most certainly "might" have been procured by the prosecution and were, in fact, under outstanding subpoenas.

Petitioner here does not seek the vindication of the violation of his Sixth Amendment right to confront witnesses against him.[8]

Petitioner's position is quite simple: (1) Article II, Section 17, of the Colorado Constitution prohibits the use of depositions where the deponents might be procured as

[8] Petitioner would respectfully reserve this point for argument on the merits should a writ of certiorari be granted.

witnesses at the time of trial by the prosecution; (2) here, the deponents were readily available to the prosecution as witnesses at trial and might have been procured as such, but were not; (3) the use of said depositions under the circumstances was contrary to the expressed will of the People of the State of Colorado who adopted said Article II, Section 17, as a part of the Colorado Constitution which was the "law of the land" of Colorado; (4) neither attorneys, courts, nor judges can evade or circumvent state constitutional mandates and when they do, this constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. See *Burgett v. Texas*, 389 U.S. 109, 113-114, 19 L.Ed 2d 319, 324, 88 S.Ct. 258 (1957) where this Court stated:

> ". . . The states are free to provide such procedures as they choose, including the rules of evidence provided that none of them infringes the guarantee in the Federal Constitution. . ."

See also *Maes v. Patterson*, 401 F.2d 200 (10th Cir., 1968) and *Dentis v. State of Oklahoma*, 376 F.2d 590 (10th Cir., 1967). Also see *Smith v. State of Kansas*, 356 F.2d 654 (10th Cir., 1966) as to ". . . The inescapable duty [of Federal Courts] to entertain the solid claim of an unconstitutional restraint by a State under color of its law. . ."

The issue here presented is one of great importance since the use of depositions in a criminal trial contrary to an express constitutional mandate goes to the very integrity and heart of the administration of criminal justice where, as here, the State and lower Federal Courts have refused to afford a defendant protection guaranteed by a state constitutional mandate, it behooves this Honorable Court to right the injustice done petitioner.

Clearly, the Court of Appeals for the Tenth Circuit has decided a very important state question in a way in conflict with applicable state law and contrary to a specific state constitutional mandate.

II.

BY HOLDING THAT PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, SAID COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND ALSO HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

In his Petition for Writ of Habeas Corpus, Petitioner raised the issue of denial of effective assistance by his court-appointed counsel, which the Colorado District Court and Court of Appeals for the Tenth Circuit perfunctorily disposed of. The issue was comprehensively briefed by Petitioner and Respondent in both the Colorado District Court and Court of Appeals for the Tenth Circuit. Respondent maintained that in order to sustain a claim of denial of effective assistance of counsel, ". . . the Petitioner must show that the representation was a mockery, a sham, or a farce.", citing *Johnson v. United States,* 380 F.2d 810, 812 (10th Cir., 1967). Petitioner, on the other hand relied upon the cases of *Beasley v. United States,* 491 F.2d 687 (6th Cir., 1974); *West v. State of Louisiana,* 478 F.2d 1026 (5th Cir., 1973); *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir., 1960); and, *Fitzgerald v. Beto,* 478 F.2d 1026 (5th Cir., 1973), all of which have rejected the "mockery, sham or farce" test.

In the case of *State v. Thomas,* 203 S.E.2d 445 (W. Va., 1974), the Court stated:

> "One learned commentator urges persuasively that Powell v. Alabama, 287 U.S. 45 (1932), guaranteed not only the timely and operative appointment of counsel, but also. the right to the assistance of counsel whose quality of performance does not fall below a certain minimum level. Waltz 'Inadequacy

> of Trial Defense Representation as a Ground of Postconviction Relief in Criminal Cases,' 59 N W. U. L. Rev. 289, 293-295 (1964). Subsequent cases bear out that conclusion. ***
>
> "Chief Justice Burger goes further and persuasively argues that it is high time that the American legal system reformed itself. First, he says that the canons of legal ethics and the policy of the bar associations should be revised to recognize specialties of competence within the law . . . .
>
> "We believe this approach to be pragmatic and realistic and we cannot see how the profession would in any manner be denigrated or demeaned by forthright recognition that some of our brethren are most skilled in a particular area of practice responsibility and to communicate this fact to the general public. ***"

So far as counsel has been able to ascertain, this Court has never passed upon the question as to what constitutes the right of an accused ". . . . to have the assistance of counsel for his defense", as guaranteed by the Sixth Amendment to the Constitution of the United States. However, an accused surely must be entitled to the assistance of counsel which amounts to more than a mere "sham, mockery or farce" in the assistance of an accused in his defense.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1389

JOSEPH DYRE MORSE, Plaintiff-Appellant, v. ALEX WILSON, Warden, Colorado State Penitentiary, Defendant-Appellee.	)	Appeal from the United States District Court for the District of Colorado (D.C. No. C-4722)

Robert L. Pitler for Plaintiff-Appellant.

E. Ronald Beeks, Assistant Attorney General (John P. Moore, Attorney General, and John E. Bush, Deputy Attorney General, on the brief), for Defendant-Appellee.

Before LEWIS, Chief Judge, and MOORE* and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

*Honorable Leonard P. Moore, Senior Judge, United States Court of Appeals, Second Circuit, New York, New York, sitting by designation.

The judgment which the appellant here seeks to reverse is that of a denial of his petition filed pursuant to 28 U.S.C. §2254, wherein he prayed for the issuance of a writ of habeas corpus releasing him from confinement in the Colorado State Penitentiary. This petition was filed January 29, 1973 and the trial court rendered its opinion denying it on June 1, 1973.

Defendant was convicted in State District Court on a charge that he murdered one Elaura Jeanne Jaquette on July 9, 1966. The Supreme Court of Colorado affirmed the conviction on March 24, 1969. *See* 452 P.2d 3. After that, a Rule 35(b) case was filed in State District Court which raised points and contentions which had not been brought to the attention of the Colorado court on the writ of error. The trial court fully considered these additional contentions and denied relief. Again, the Colorado Supreme Court affirmed this decision in Morse v. People, 501 P.2d 1328 (1972). Soon thereafter, the §2254 petition was filed in the District Court for the District of Colorado, and we now review the judgment rendered in that proceeding.[1]

On the original appeal the Colorado Supreme Court refused to consider the two issues mentioned above because of failure to raise them in the trial court. The inadequate record also precluded the requested review. The contentions were considered in a subsequent review and were determined to be wholly lacking in merit.

The main contentions are, first, that the appellant's constitutional rights were violated as a result of the admission at the trial of depositions of his daughters which contained evidence which strongly inculpated him. In this connection, a related argument is that his right to confront witnesses as guaranteed by the Sixth Amendment to the Constitution of the United States was violated.

Second, that at the original trial appellant's right to be represented by counsel was violated in that the counsel assigned to him were ineffective.

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[1] It is unnecessary and not desirable to relate the background facts which were adduced at trial.

Still a further point is that appellant's rights under the Fifth and Fourteenth Amendments were violated because, according to the argument of the present counsel, he was not given adequate *Miranda* warnings.

In the second opinion of the Supreme Court of Colorado and that of the United States District Court as well, the issues which are now raised were fully explored and tested. Furthermore, a careful consideration of the record of the District Court fails to show any meritorious basis for granting of relief.

We shall nevertheless comment briefly on the points advanced.

The argument and contention concerning the alleged prejudice arising from the use of the depositions of defendant's minor daughters stem from the provision of the Colorado Constitution, Article II §17, which contains a prohibition against the use of depositions if the presence of witnesses can be obtained.[2] Such an issue is not here appropriate, however, unless it contravenes the Constitution of the United States.

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[2]This section provides as follows:

> No person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. If he can give security he shall be discharged; if he cannot give security his deposition shall be taken by some judge of the supreme, district or county court, at the earliest time he can attend, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice. The accused shall have the right to appear in person and by counsel. If he have no counsel, the judge shall assign him one in that behalf only. On the completion of such examination the witness shall

Our inquiry is, of course, limited to whether appellant's federally protected rights were violated and with particular reference to appellant's rights granted by the Fourteenth Amendment, for obviously the state court's decision construing and applying its Constitution cannot be reviewed for the purpose of determining whether it is erroneous. However, the defendant is not precluded from arguing that there has been a violation of his constitutional rights, even though the basic violation relied on is Article II §17 of the Colorado Constitution, *supra*, and there is no problem here of failure to exhaust state remedies nor intentional bypass thereof. *Cf.* Fay v. Noia, 372 U.S. 391 (1963). *See also* Henry v. State of Mississippi, 379 U.S. 443 (1965).

It is to be noted that the deponents were minors, one being 12 years old and the other 17. At the 35(b) motion hearing the judge found that there was ample opportunity for the defendant through his counsel to object to the introduction of these depositions but he did not do so. The judge also called attention to the fact that the testimony given was highly prejudicial to the defendant. He summarizes it as follows:

> That the testimony contained in the depositions, in summary, is that on the day of the murder, the defendant arrived home late in the afternoon; that he was wearing clothes which were ill-fitting; that he had his clothes in a bucket in which some fluid was contained; that he was bare footed; that his shoes were muddy and matted with what appeared to be blood; that he requested his daughter to wash his clothes for him and clean and shine his shoes,

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[2] (Continued)

> be discharged on his own recognizance, entered into before said judge, but such deposition shall not be used if in the opinion of the court the personal attendance of the witness might be procured by the prosecution, or is procured by the accused. No exception shall be taken to such deposition as to matters of form.

> which she did; and that he later put the clothes he had worn home into the incinerator and burned them.

The trial court in the Rule 35(b) hearings also took notice of the fact that there was evidence at the trial of concern for the juvenile witnesses on the part of the judge and the attorneys on both sides because of the trauma to both the defendant-father and the daughters which would flow from the reading of these depositions. The court made the obvious observation that there would have been additional trauma had the testimony been presented live. The opinion of Mr. Justice Erickson, in reviewing the 35(b) motion wherein he wrote that the deposition route was taken as a matter of strategy, was fully supported.

In view of these facts, we are unable to perceive federal constitutional basis.

It is argued that the right granted by the Colorado constitutional provision is absolute and not subject to waiver. We disagree. The clause of Article II § 17 dealing with the use of a deposition is an incidental provision. The main thrust of the section is prevention of imprisonment of a witness who cannot give bond or security for his or her appearance and thus the clause limits use of the testimony of an itinerant witness. This very clause allows the defendant to secure the presence of the witness if he wishes. Reading the provision in its entirety and considering its object and purpose, we are convinced that there could be a waiver and that indeed there was.

Nor is there any merit to the contention that the defendant's right to confront the witnesses was infringed. The object of the confrontation provision of the Sixth Amendment is to insure the right of examination and cross-examination. An early decision mentioned that its object was prevention of "depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and

sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-243 (1895). The Supreme Court has also held, however, that the right may be waived, but it must be uncoerced waiver. *See* Brookhart v. Janis, 384 U.S. 1 (1966).

The case most often cited in support of exclusion of the testimony is Pointer v. Texas, 380 U.S. 400, 406-407 (1965). The complaining witness in that case had testified at a preliminary hearing at which defendant was not represented by counsel and had not cross-examined. By the time of trial, the witness had left the state and no effort had been made to secure his presence. *See also* Barber v. Page, 390 U.S. 719, 725 (1968) in which the preliminary hearing testimony of a witness who was in a federal prison was offered; the Supreme Court held that such testimony could not be used because the witness was not unavailable. *See also* Mancusi v. Stubbs, 408 U.S. 204 (1972). *But see* Dutton v. Evans, 400 U.S. 74 (1970) and California v. Green, 399 U.S. 149, 155-156 (1970), wherein prior hearsay statements of a witness were ruled admissible, notwithstanding that he claimed at the trial that because he was under the influence of LSD at the time of the occurrence he could neither deny nor affirm the truth of the prior statements which were offered and received; the witness was present at trial and was subject to cross-examination.

One of the other statements in California v. Green consisted of testimony at a preliminary hearing given by the same witness. This was held admissible because the defendant had been present with counsel at the preliminary hearing and had been subjected to cross-examination. The first statement had been made to policemen during interrogation. The Court reasoned as to both that the declarant had been present at the trial and could have been cross-examined then.

The *Green* and *Dutton* cases thus take a less restrictive view of acceptance of prior testimony or statements. The Court in

these cases does not require actual confrontation. The question in these cases is rather whether the trier of fact has a basis for evaluating the truth of the statements and the further inquiry whether cross-examination could undermine the statement.[3]

The depositions in question were taken with the consent of the defendant and his counsel, and the witnesses were subjected to cross-examination. Further, it was open to counsel (for the defendant) to consider it advantageous to take the depositions rather than to have the witnesses in court.

Judged by either the older cases or the more recent decisions in *Green* and *Dutton*, we see no semblance of a question of violation of the confrontation clause of the Sixth Amendment (Fourteenth).

A final contention of appellant that his rights were violated in connection with the obtaining of post arrest statements is also without merit. He, of course, contends that he was not given adequate warning. However, the record belies this. As the Supreme Court of Colorado noted in the first review, following the defendant's arrest the first thing that the officers did was to read and explain the so-called advisement form, which form was signed by the defendant. The Court further noted that the appellant was readvised on several occasions and signed one of two of the so-called advisement forms. Soon after his arrest he was taken before the municipal judge at Boulder and was again advised of his constitutional rights and of his right to counsel. In the light of this, it is impossible to hold that the defendant's constitutional rights were violated.

There is no merit in any of the petitioner's contentions. Hence, the judgment of the District Court should be and the same is hereby affirmed.

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[3] In our case the cross-examination issue is not present.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-4722

JOSEPH DYRE MORSE,	)	
	)	MEMORANDUM
Petitioner,	)	OPINION AND
	)	ORDER
vs.	)	
	)	DENYING
FRED WYSE, WARDEN (Acting)	)	PETITIONER'S
COLORADO STATE PENITENTIARY,	)	APPLICATION
	)	FOR A WRIT OF
Respondent.	)	HABEAS CORPUS

APPEARANCES

For the Petitioner: Robert L. Pitler
522 University Building
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Denver, Colorado 80202

For the Respondent: John P. Moore, Attorney General
by
E. Ronald Beeks
Assistant Attorney General
104 State Capitol
Denver, Colorado 80203

FINESILVER, Judge

THIS MATTER comes before this Court on the Petition for Writ of Habeas Corpus filed by the Petitioner. Petitioner appeared in person and with his attorney Robert L. Pitler. The Court having heard arguments of counsel, conducted independent research and being advised in the premises enters the following Memorandum Opinion and Order.

STATEMENT OF THE CASE

The petitioner, Joseph Dyre Morse, was convicted of first degree murder by a jury in Criminal Action No. 4090 in the District Court, County of Boulder, Colorado. Life sentence was imposed on December 6, 1966 and prison commitment followed. A Motion for New Trial was denied on December 6, 1966. Petitioner's Writ of Error in the Colorado Supreme Court was denied thereby affirming petitioner's judgment and sentence. *Morse v. The People,* 168 Colo. 494, 452 P.2d 3 (1969), *reh. denied.* Subsequently, in August, 1969, petitioner filed a Motion for Relief under Rule 35(b), Colo. R. Crim. Pro. The trial court denied this motion and the denial was affirmed by the Supreme Court of Colorado. *Morse v. The People,* ____ Colo. ____, 501 P.2d 1328 (1972), *reh. denied.* Petitioner now seeks federal habeas corpus relief under 28 U.S.C.A. §2254.

The trial transcript record and several Supreme Court opinions reflect that a question arose relating to the use of depositions of petitioner's minor daughters. The daughters were age 12 and 17. It appears that a conference was held in the judge's chambers on the question of the use of the depositions. The trial judge, prosecuting attorney and petitioner's attorney* were present at this *in camera* proceeding. The record is silent on the ensuing discussion that resulted in the stipulated use of the depositions at trial. The depositions of the two witnesses were used at trial; the witnesses were not called to testify by the petitioner or the district attorney. The witnesses lived within 20 miles of the Boulder Courthouse.

The Colorado Supreme Court [Erickson, J.] in the latter *Morse* case opined that the rationale behind reading the depositions to the jury rather than calling the young deponents for live testimony was the grave psychological effect that such testimony would have on the jury and perhaps the deponents themselves; also, that effective defense trial tactic militated against the personal appearance of the witnesses.

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*Petitioner's present counsel did not represent him at trial.

It is significant to note that petitioner did not object to the taking of the depositions. At the deposition session petitioner and his attorney were present. Petitioner's counsel had the opportunity to cross-examine the witnesses and did in fact cross-examine the deponents.

ISSUE

The pivotal issue is whether Petitioner's Sixth Amendment Right of Confrontation under the Colorado Constitution was violated through the introduction of the depositions rather than the personal appearance of the witnesses at trial.

PARTYS' CONTENTIONS

The crux of petitioner's application centers on the use of the depositions at trial. Petitioner's conviction, he submits, "primarily resulted from the deposition testimony of JoAnna and Emily Morse which was highly prejudicial and constitutionally incompetent under Article II, Section 17" of the Colorado State Constitution. (P.6, Petition for Writ of Habeas Corpus)

That provision reads in pertinent part:

> ". . . [A] deposition shall not be used if in the opinion of the court the personal attendance of the witness might be procured by the prosecution, or is procured by the accused."

Further, petitioner objects to the use of the depositions at trial since the mandatory exclusion requirement of Rule 15(e), Colo. R. Crim. Pro. were not met.

Rule 15(e) in its entirety states:

> At the trial, or at any hearing a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if:
> (1) The witness is dead; or
> (2) The witness is unable to attend or testify because of sickness or infirmity; or

> (3) The party offering the deposition has been unable to procure the witness's attendance by subpoena; or
>
> (4) The witness is out of the state, his presence cannot be secured by subpoena or other lawful means, and his absence was not procured by the party offering the deposition. A deposition may also be used to contradict or impeach an adverse party or the offering party's own hostile witness if surprise is shown. If a party offers in evidence only a part of a deposition, any adverse party may require him to offer any other part or parts relevant to the part offered. In addition, any party may offer other parts.

Flowing from the above mandates, petitioner, in essence, contends that the trial court exceeded its constitutional authority by the use of the depositions under the right of confrontation provision of the Colorado Constitution. Article II, Section 16. Petitioner claims that these constitutional provisions are substantive mandates that cannot be waived or agreed away by stipulation of counsel and/or the trial judge.

It is contended that since the deponents lived within 20 miles of the court a good faith effort should have been undertaken to produce these young girls. None was made. Thus, petitioner submits, a clear violation of Article II, Sections 16 & 17 and Rule 15(e) occurred.

Further, petitioner claims his due process rights were placed in jeopardy since the record is completely lacking of any indication that petitioner was present at the *in camera* proceeding or that he took part in or had any knowledge or advice relating to this discussion.

Respondent submits that petitioner's confrontation rights were not infringed upon. He notes that the right of confrontation is a two-pronged right.

First, the right of the defendant to cross-examine the witness;

Second, the right of the defendant to have the jury view the witnesses. *Barber v. Page,* 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L. Ed.2d 255 (1968). Since the petitioner and his lawyer were present during the taking of the depositions (trial record, 1366), and since both deponents were thoroughly cross-examined (trial record, 1420-1437, 1478-1483), the petitioner clearly was not denied the cross-examination aspect of his right to confrontation. *See Pointer v. Texas,* 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L. Ed.2d 923 (1965). Thus, petitioner can only claim a denial of his right to have the jury view the two witnesses. But to hold a witness' appearance before the jury to be a requirement immune to exception (e.g. waiver) would preclude the use of depositions in any case whatsoever. *Id.* at 407. "[A]n adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L. Ed.2d 934 (1965). (P.2,3 Respondent's Answer to Show Cause)

LAW

We hold that petitioner's due process rights were not violated and that no abuse of the constitutional provisions above occurred by use of the depositions at trial.

District Judge John Barnard, the state trial judge who presided at the trial and post trial hearing, entered findings of fact following the hearing. The Colorado Supreme Court reviewed the facts in denying petitioner post trial relief.

In 1966, 28 U.S.C.A. §2254 was amended so that a presumption of correctness was given, in certain cases, to state court determinations of fact. In *Maes v. Patterson*, 401 F.2d 200 (10th Cir. 1968), the Tenth Circuit said:

> Practical impacts of the 1966 amendment were to relieve federal courts of the necessity of relitigating factual issues determinative of federal rights claimed by state prisoners, of trying such an issue de novo, and of further relieving the federal courts from merely reiterating the proper

> application of federal legal rights when the state court has correctly applied the federal law. In many, perhaps in most, of the applications for federal habeas corpus disposition can now be made without an evidentiary hearing. But the duty of the federal court remains to make an independent determination that due process has been observed in the factual and legal support for state adjudications. Section 2254 does not purport to apply the finality of res judicata to any state determination of a federal right. The federal court may indulge in the presumption that the state court's determination of the facts is correct, and ordinarily should accept the state-found facts, when reviewing the state record. [401 F.2d at 201].

It is clear that a Federal Court Judge cannot accept the state court's findings of fact without reviewing the state court's record and has determined that the facts were adequately developed at a full and fair hearing. *Cindle v. Page*, 424 F.2d 509 (10th Cir. 1970); *Hoy v. Crouse*, 411 F.2d 810 (10th Cir. 1969); *Maes v. Patterson, supra.*

We find that *Green v. California*, 399 U.S. 149, 90 S.Ct. 1930, 26 L. Ed.2d 489 (1970) is persuasive on the issues of the legitimate use of the depositions and confrontation entitlement. In that case, the court, speaking through Mr. Justice White, held that statements made by defendant's accuser at a preliminary hearing given under oath and subject to cross-examination by defendant's counsel were admissible at defendant's subsequent trial. Defendant's guaranteed right to confront his accuser was safeguarded under this procedure.

In light of *Green*, the salient fact remains that petitioner's Sixth Amendment confrontation rights were exercisable at the taking of the deposition. The deponents testimony was subject to cross-examination and were in fact cross-examined. Petitioner met his accusers "face to face", Article II, Section 16, Colorado State Constitution. Thus, testimony given at the taking of the depositions satisfied confrontation requirements for our ruling herein.

In addition and as a separate ground we also hold that the entitlement to confrontation can be waived. *Diaz v. U.S.*, 223 U.S. 442, 32 S.Ct. 250, 56 L. Ed. 500 (1912); *Herrera v. Wilson*, 364 F.2d 798 (9th Cir.), *cert. denied*, 385 U.S. 980 (1966). Waiver can take many forms and from a totality of the factual circumstances we conclude that an effective waiver was made by petitioner through counsel.

We reject petitioner's argument that his counsel can not stipulate away the constitutional mandates of Article II, Sections 16 and 17. In our view these constitutional provisions, in the context of this case, are procedural in nature rather than substantive and are clearly of a nature that may be waived personally or by counsel and are subject to stipulation by counsel. In this framework, the trial judge did not exceed his power in admitting the depositions as competent evidence.

CONCLUSION

We have carefully read the record and transcripts of the trial and post-trial proceedings and the several Colorado Supreme Court opinions therein; we conclude that petitioner has been afforded due process in the state courts of Colorado and that petitioner was not denied any of his due process rights as guaranteed by the United States and Colorado Constitution and amendments thereto and Colorado Rules of Criminal Procedure.

The determination of facts by the state trial judge and Colorado Supreme Court are adequately and fully supported in the record in this case.

ORDER

The Court expressly incorporates herein by reference its bench ruling of April 12, 1973 denying Petitioner's Application for Writ of Habeas Corpus.

IT IS HEREBY ORDERED that Petitioner's, Joseph Dyre Morse, Application for Writ of Habeas Corpus is DENIED and the Petition is DISMISSED.

DATED at Denver, Colorado, this 30th day of May, 1973.

BY THE COURT:

SHERMAN G. FINESILVER, Judge
United States District Court